Supreme Court, U.S.
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No. 02-1067

In the Supreme Court of the United States

OCTOBER TERM, 2002

NOVA CHEMICALS, INC.,

Petitioner,

v.

LEONARD ADAMS; MICHAEL NOAL;
VIRGINIA PHILLIPS; DEBRA BLACK,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

BRIEF OF AMICI CURIAE AMERICAN CHEMISTRY COUNCIL; AMERICAN PETROLEUM INSTITUTE; AMERICAN TRUCKING ASSOCIATIONS, INC.; CHLORINE INSTITUTE, INC.; COMPRESSED GAS ASSOCIATION; DANGEROUS GOODS ADVISORY COUNCIL; FERTILIZER INSTITUTE; INSTITUTE OF MAKERS OF EXPLOSIVES; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; NATIONAL PAINT AND COATINGS ASSOCIATION, INC.; NATIONAL TANK TRUCK CARRIERS, INC.; AND SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

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INTEREST OF AMICI CURIAE

The American Chemistry Council (ACC) is an industry group that represents America's leading chemical producers.[1] Chemical production is a $460 billion annual business and a key element of the Nation's economy. Chemical producers are America's leading exporters, with more than $80 billion of exports in 2000. ACC's 175 member companies constitute more than 90% of the industrial chemical-production business in the United States and are heavily involved in the shipment of hazardous materials. As a condition of membership in ACC, member companies participate in the Responsible Care® initiative, an industry-wide safety and security program.

The American Petroleum Institute (API) represents more than 400 member companies in all aspects of the petroleum industry. API members own petroleum terminals and truck and rail fleets for the distribution of petroleum products. API and its members have a longstanding commitment to providing safe transportation of petroleum products in compliance with federal hazardous materials law.

The American Trucking Associations, Inc. (ATA), is the national trade association of the trucking industry. Its membership includes more than 2,000 trucking companies and suppliers of equipment and services. In cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers, including for-hire carriers, private carriers, leasing companies, and others. ATA was created to promote and protect the interests of the trucking industry. ATA regularly

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief; pursuant to Supreme Court Rule 37.2, letters evidencing this consent have been filed with the Clerk.

advocates the trucking industry's position before this Court and other courts.

The Chlorine Institute, Inc. (CI), is a 225-member worldwide association of producers, packagers, distributors, users, and suppliers of certain chemicals. CI's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution, and use of those chemicals. Because each of those chemicals is a hazardous material, CI is concerned with all facets of hazardous materials transportation.

The Compressed Gas Association (CGA) is a non-profit association dedicated to the development and promotion of safety standards and safe practices in the industrial and medical gas industry. It represents manufacturers, distributors, suppliers, and transporters of gases, cryogenic liquids, and related products.

The Dangerous Goods Advisory Council (DGAC) is a non-profit association established to promote the safe transportation of hazardous materials by supporting adoption of sound, effective, and uniform safety standards and by providing an extensive training program. DGAC comprises 158 member companies that ship hazardous materials, and 21 trade associations representing thousands of shippers, producers, distributors, and manufacturers.

The Fertilizer Institute (TFI) is the national trade association of the fertilizer industry. TFI's members include the Nation's fertilizer producers, manufacturers, retailers, trading firms, and equipment manufacturers.

The Institute of Makers of Explosives (IME) represents American manufacturers and distributors of high explosives, and related companies. IME member companies produce over 95% of the more than 2.5 million metric tons of explosives consumed annually in the United States, and distribute more than $1 billion in explosive products per year worldwide. IME

is concerned with ensuring the safe and secure manufacture, transportation, and distribution of those products.

The National Industrial Transportation League (NITL) is a national trade association representing about 700 companies that conduct industrial and commercial enterprises both domestically and internationally and are concerned with the transportation of goods in domestic and international commerce. NITL members are involved in all modes of transportation, including transportation by road and by rail. Numerous NITL members transport, ship, and receive large quantities of hazardous materials regulated under federal law.

The National Paint and Coatings Association, Inc. (NPCA), is an industry association comprising some 400 members engaged in the manufacture and distribution of paint, coatings, adhesives, and related products, and the raw materials used to produce these products. The paint and coatings industry uses a variety of methods of transportation to distribute its products throughout the Nation, particularly road and rail. Virtually all of NPCA's members transport, or cause to be transported, hazardous materials subject to federal regulation. NPCA members participate in Coating Care®, a voluntary initiative designed to promote the safe, efficient, and secure transportation and distribution of paint and coatings products.

National Tank Truck Carriers, Inc. (NTTC), is a trade association composed of about 180 trucking companies specializing in the nationwide distribution of hazardous materials. Almost all of NTTC's members are subject to federal hazardous materials law. NTTC members operate in all 50 states and virtually all local jurisdictions.

The Synthetic Organic Chemical Manufacturers Association (SOCMA) is a trade association representing batch and custom chemical manufacturers. More than 2,000 batch processing facilities produce the 50,000 specialty and custom chemicals manufactured in the United States, at a value of about $60

billion per year. SOCMA's 320 members rely on the Nation's hazardous materials transportation network to ship their raw materials, intermediates, and products. As a condition of membership in SOCMA, member companies participate in the Responsible Care® initiative, an industry-wide safety and security program.

SUMMARY OF ARGUMENT

This case presents a vital question of federal preemption, with significant ramifications both for public safety and for homeland security. The Louisiana Court of Appeals held that the owner of hazardous materials could be liable for tort damages under state law, even though the owner contracted with a qualified independent shipper to handle the storage and loading of those materials. That requirement is expressly preempted by federal law, which explicitly takes into account contractual arrangements between the parties in determining which entity is responsible for hazardous materials shipments. The Louisiana Court of Appeals' decision not only is inconsistent with the congressionally stated desire for uniformity in the regulation of hazardous materials shipments, but will impose crippling, unnecessary, and potentially counterproductive obligations on *amici*'s members. Moreover, if the Louisiana Court of Appeals' decision is allowed to stand, other States will be given a green light to impose additional requirements of their own. Because this is a case of substantial legal and practical importance, *certiorari* is warranted.

REASONS FOR GRANTING THE WRIT

I. FEDERAL LAW PREEMPTS THE LOUISIANA COURT OF APPEALS' REQUIREMENT THAT OWNERS HAVE A DUTY OF CARE IN THE SHIPMENT OF HAZARDOUS MATERIALS.

As a matter of law, the Louisiana Court of Appeals' requirement that an owner of hazardous materials has a nondelegable, tort-based duty of care, even where that owner

has entered into an agreement with an independent contractor for the shipment of those materials, is clearly preempted by the elaborate federal regulatory scheme governing such shipments.

A. In 1975, Congress enacted the Hazardous Materials Transportation Act (HMTA), Pub. L. No. 93-633, 88 Stat. 2156. The HMTA was designed to "replace a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations." *Southern Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990).

In 1990, Congress enacted the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), Pub. L. No. 101-615, 104 Stat. 3244, which substantially amended the HMTA. In the HMTUSA, Congress made statutory findings emphasizing the desirability of uniform standards for the shipment of hazardous materials. *See* 49 App. U.S.C. § 1801 note (1993). In particular, Congress stressed that divergent state and local laws "creat[ed] the potential for unreasonable hazards in other jurisdictions and confound[ed] shippers and carriers which attempt[ed] to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements." *Id.* In fact, Congress felt so strongly about the need for a uniform regulatory scheme that it gave DOT plenary authority to regulate intrastate and foreign hazardous materials shipments, as well as interstate ones. *See* 49 U.S.C. § 5103(b)(1).

B. In order to effectuate a uniform national scheme of hazardous materials regulation, Congress included a broad express-preemption provision, which essentially codifies this Court's test for implied preemption. That provision, which was initially set out in a Department of Transportation (DOT) regulation and was subsequently codified in materially identical form in the HMTUSA, provides that any state "requirement" is preempted either if it is impossible to comply both with that requirement and with any federal statutory or regulatory

hazardous materials requirement, or (as is relevant here) if the state requirement constitutes an obstacle to accomplishing and carrying out any federal hazardous materials statute or regulation. *See* 49 U.S.C. § 5125(a). Notably, in the recently enacted Homeland Security Act, which created the new Department of Homeland Security (DHS) in the wake of the 2001 terrorist attacks, Congress amended the express-preemption provision in the HMTUSA to make clear that state law is subject to preemption not only by statute or by regulations promulgated by DOT, but also by any regulations or directives issued by the new DHS relating to hazardous materials transportation security. *See* Pub. L. No. 107-296, § 1711(b)(2), 116 Stat. 2135, 2320 (2002) (amending 49 U.S.C. § 5125(a)).[2]

In light of the breadth of this express-preemption provision, it is perhaps unsurprising that two courts of appeals have held that state hazardous materials regulations are preempted, even where those regulations impose comparatively light obligations on shippers and carriers. For instance, in *Southern Pacific Transportation Co.*, the Ninth Circuit held that a state requirement that carriers of hazardous materials obtain a permit was preempted by HMTA, on the ground that such a requirement would "create a separate regulatory regime for these activities, fostering confusion and frustrating Congress' goal of developing a uniform, national scheme of regulation." 909 F.2d at 358. In a subsequent case involving *amicus* Chlorine Institute, the same court similarly held that a state requirement that certain vehicles transporting hazardous materials be accompanied by escort vehicles was preempted. *See Chlorine Inst. v. California Highway Patrol*, 29 F.3d 495,

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[2] In addition, the Homeland Security Act expressly authorizes DOT to issue regulations relating to the security of hazardous materials transportation, on top of its preexisting responsibility to issue regulations regarding *safety*. *See* Pub. L. No. 107-296, § 1711(b)(1), 116 Stat. at 2319 (amending 49 U.S.C. § 5103(b)(1)).

497-98 (9th Cir. 1994). And the Tenth Circuit similarly found preemption with regard to a state regulatory scheme that would have required carriers to obtain a permit, carry certain documentation, and provide advance notification of shipments. *See Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1583 (10th Cir. 1991).

C. Even by the usual standards of federal regulation, the regulatory scheme outlined by the HMTA and HMTUSA, *see* 49 U.S.C. §§ 5101-5127, and implemented by DOT, *see* 49 C.F.R. pts. 171-180, is an extraordinarily voluminous and complex one. That regulatory scheme imposes detailed obligations on persons who "offer or accept a hazardous material for transportation in commerce." 49 C.F.R. § 171.2(a). And the statute imposes civil and criminal penalties for violations of the regulations. *See* 49 U.S.C. §§ 5123-5124.

DOT's regulations do not contain an explicit definition of what constitutes an "offeror," and therefore what entities are responsible for hazardous materials shipments under the elaborate federal regulatory regime. However, in a series of informal rulings, and ultimately in a formal interpretation of the regulations, DOT has established clear standards for determining whether a owner or a shipper is an "offeror." Specifically, in its formal interpretation, DOT made clear that the "contractual arrangements between the parties" are an important factor in determining which entity constitutes the "offeror." Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act, 55 Fed. Reg. 6758, 6761 (Feb. 26, 1990).

D. The Louisiana Court of Appeals' decision creates a state-law requirement that is arguably more sweeping than any of the state hazardous materials requirements already found to be preempted by the Ninth and Tenth Circuits. The effect of the Louisiana Court of Appeals' decision is to impose a nondelegable duty of care on owners of hazardous materials which bear no obligations under federal law. That duty at a

minimum presents an obstacle to the effectuation of the federal regulatory regime, which allows owners of hazardous materials to enter into contractual agreements with qualified and independent shippers to handle the storage and loading of those materials, and thereby to shift responsibility, and liability, to those shippers. *Cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-75 (1993) (holding that federal regulation on maximum train speed preempted state common-law duty to operate train at moderate and safe rate of speed). The Louisiana Court of Appeals' decision effectively precludes owners from contracting out responsibility for shipments that pass through Louisiana — in this case, a shipment traveling from Portugal to Tennessee — and therefore introduces inconsistency into an otherwise uniform national scheme. For this reason, the Louisiana Court of Appeals' decision is erroneous. This Court should either summarily reverse that decision, or grant *certiorari* to review it. To the extent the Court is uncertain whether *certiorari* is warranted, it should call for the views of the Office of the Solicitor General, which has argued cases even in the courts of appeals involving HMTA and HMTUSA preemption. *See, e.g., Colorado Pub. Utils. Comm'n*, 951 F.2d at 1574.

II. IF ALLOWED TO STAND, THE LOUISIANA COURT OF APPEALS' DECISION WILL HAVE ENORMOUS PRACTICAL IMPLICATIONS.

Absent this Court's intervention, the Louisiana Court of Appeals' decision will impose crippling, unnecessary, and potentially counterproductive obligations on *amici*'s members. More than 3.2 billion tons of hazardous materials are shipped in the United States per year by truck, train, ship, and plane, with some 800,000 shipments occurring every day. *See* Departmentwide Program Evaluation of the Hazardous Materials Transportation Programs at i, v (DOT March 2000). *Amici*'s members offer for transportation, or themselves transport, a substantial percentage of those shipments. Ensuring

that this massive volume of hazardous materials moves safely and securely through all 50 states and more than 33,000 local jurisdictions is a daunting task — one that would be made impossible if each jurisdiction could impose its own regulations. The Louisiana Court of Appeals' decision will have tangible consequences for *amici*'s members in two primary ways.

A. The Louisiana Court of Appeals' decision will require owners of hazardous materials, most of which have no expertise in the shipment of such materials, and many of which are small businesses, to supervise shipments while they are traveling through the State of Louisiana. It will no longer be possible for an owner to enter into a contractual arrangement with a shipper experienced in handling hazardous materials, and thus delegate responsibility to that shipper. As the petition notes, the owner will effectively be required to "ride shotgun" with the shipment, providing its own inspectors to oversee the performance of persons not in the owner's employ. *See* Pet. 20. Indeed, this oversight obligation may continue even after the shipment has been delivered, to the extent that residue of the materials being shipped is left in the container or vehicle and therefore remains subject to federal regulation. The introduction of additional inspectors will lead to delays, which in and of themselves could increase the risk of accidents and also compromise the security of hazardous materials shipments, a prime target for terrorists. *See, e.g.*, Brian DeBose & Guy Taylor, *Trucks with Hazardous Cargo Get Heightened Scrutiny*, Wash. Times, Sept. 28, 2001, at B1. It will also lead to a hopeless fragmentation of responsibility for hazardous materials shipments, particularly in cases in which materials owned by a large number of different companies are transported in a single container or vehicle. The safety and security implications of this additional requirement are especially acute because Louisiana is a vital hub in the transportation of hazardous materials throughout the United States. *See* Pet. 21-22.

B. The Louisiana Court of Appeals' decision will also impose massive costs on the owners of hazardous materials — costs that will only be exacerbated if other States, emboldened by this Court's refusal to intervene, impose similar requirements. In the wake of the 2001 terrorist attacks, hazardous materials producers have already made substantial investments in increased security, despite worsening economic conditions. Should the Louisiana Court of Appeals' decision be allowed to stand, hazardous materials owners will be required either to devote additional scarce resources to the nondelegable obligation of overseeing shipments while they are traveling through Louisiana, or to reroute their shipments to avoid Louisiana altogether where possible (thereby unfairly exporting risk to other States that do not seek to impose additional obligations of their own). This Court should act to ensure that companies involved in hazardous materials transportation are free from such State-imposed obligations, and thereby protect the integrity of the federal regulatory scheme.

CONCLUSION

This Court should summarily reverse the decision of the Louisiana Court of Appeals. In the alternative, the Court should grant the petition for writ of *certiorari* and set the case for full briefing and oral argument. At a minimum, the Court should invite the Solicitor General to express the views of the United States on this issue of vital importance to American industry.

Respectfully submitted,

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